

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of:

Petition of United Stationers  
Inc., United Stationers Supply  
Co. and Lagasse LLC for  
Retroactive Waiver of 47 C.F.R.  
§64.1200(a)(4)(iv)

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CG Docket No. 02-278  
CG Docket No. 05-338

**REPLY COMMENTS OF UNITED STATIONERS INC.,  
UNITED STATIONERS SUPPLY CO., AND LAGASSE LLC**

United Stationers Inc., United Stationers Supply Co., and Lagasse LLC (collectively, “United” or “Petitioners”), by and through their undersigned attorneys, hereby offer these reply comments in support of their petition for a retroactive waiver of Section 64.1200(a)(4)(iv) of the Commission’s rules for faxes sent on or before April 30, 2015.<sup>1</sup> The only opposition to United’s Petition for retroactive waiver is from serial TCPA class action plaintiffs, Craftwood II, Inc. and Craftwood Lumber Company (collectively, “Plaintiffs” or “Craftwood”).<sup>2</sup> Plaintiffs’ comments do not raise any new or original arguments that the FCC hasn’t already addressed. United meets all of the Commission’s requirements for waiver and thus it should grant United’s petition.

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<sup>1</sup> See 47 C.F.R. § 227(b)(1)(C); see also Junk Fax Protection Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005); See 47 C.F.R. § 64.1200(a)(4)(iv).

<sup>2</sup> In addition to the pending case filed against United, the Plaintiffs have filed at least six other complaints asserting TCPA claims in connection with faxes: *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11-cv-4462, 2011 WL 9162512 (N.D. Ill. June 30, 2011); *Craftwood II, Inc. v. Tomy Int’l, Inc.*, No. SA CV 12-1710 DOC (ANx), Dkt. 1 (C.D. Cal. Sept. 14, 2012); *Craftwood Lumber Co. v. Seaboard Int’l Forest Prods., LLC*, No. 1:13-CV-07433, Dkt. 1 (N.D. Ill. Oct. 16, 2013); *Craftwood Lumber Co. v. Auburn Armature, Inc.*, No. 1:14-CV-06868 (N.D. Ill. Sept. 5, 2014); *Craftwood Lumber Co. v. CMT (USA), Inc.*, No. 1:14-CV-06864, Dkt. 1 (N.D. Ill. Sept. 5, 2014); *Craftwood Lumber Co. v. Senco Brands, Inc.*, No. 1:14-CV-06866 (N.D. Ill. Sept. 5, 2014).

## INTRODUCTION

In 2006, in its *Junk Fax Order*, the Commission amended its rules to incorporate the changes in the Junk Fax Prevention Act (“JFPA”).<sup>3</sup> In the *Junk Fax Order*, among other things, the Commission adopted a rule providing that a fax advertisement “sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice.”<sup>4</sup> The *Junk Fax Order*, however, also contained conflicting language in a footnote that “the opt-out notice requirement [required by this order] only applies to communications that constitute *unsolicited* advertisements.”<sup>5</sup>

In October 2014, the FCC determined that the conflicting language caused confusion among affected parties regarding whether the opt-out language was required in *solicited* fax advertisements. Due to this confusion, the Commission found that good cause existed for a retroactive waiver, and that a retroactive waiver would be in the public interest.<sup>6</sup> The Commission invited similarly situated entities to request retroactive waivers, causing over 100 parties to file similar petitions. Like the affected parties before it, United demonstrated in

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<sup>3</sup> See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Junk Fax Protection Act of 2005, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd. 3787 (2006) (the “*Junk Fax Order*”).

<sup>4</sup> 47 C.F.R. § 64.1200(a)(4)(iv).

<sup>5</sup> *Junk Fax Order*, 21 FCC Rcd. at 3810 n.154 (emphasis added).

<sup>6</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, 29 FCC Rcd 13998, FCC 14-164, ¶¶ 26-28 (Oct. 30, 2014) (the “*Solicited Fax Order*”).

its petition for waiver that it was similarly situated to the parties before the FCC when the Order was issued, that good cause existed, and that granting a waiver would be in the public interest.<sup>7</sup>

**I. UNITED'S PETITION IS NOT TIME-BARRED**

In the *Solicited Fax Order*, the Commission invited similarly-situated parties to file for a retroactive waiver, stating that it “expected” (but did not explicitly require) parties to file within six months of the Order’s release.<sup>8</sup> Plaintiffs assert that the Commission should deny United’s petition, because it was filed after this alleged deadline. Contrary to Plaintiffs’ contention, the *Solicited Fax Order*’s expectation is not a deadline, and the Commission must, under the law, consider United’s petition on the merits.

The *Solicited Fax Order* simply does not contain the deadline Plaintiffs allege. In the Order, the Commission stated that “[o]ther, similarly situated parties, may also seek waivers” such as those granted to Anda and other petitioners.<sup>9</sup> It invited *all* similarly situated parties to seek a waiver. Although the FCC expressed its expectation that parties would file by April 30<sup>th</sup>, that hardly was a deadline. In fact, all the Commission stated was that it expected similarly situated parties to “make every effort” to file within that timeframe and pledged that “*all* future waiver requests will be adjudicated on a case-by-case basis.”<sup>10</sup> The Commission did not suggest that it would deny such waiver requests after that date. Nor did it suggest that the date of filing has any bearing on whether a petitioning party is similarly situated. Put simply, the FCC’s

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<sup>7</sup> See *In the Matter of Petition of United Stationers Inc., United Stationers Supply Co. and Lagasse LLC for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338, Petition for Retroactive Waiver (2015) (the “*United Petition*”).

<sup>8</sup> See 5 USC § 551 *et seq.*

<sup>9</sup> *Solicited Fax Order*, ¶ 30.

<sup>10</sup> *Id.* ¶ 31 & n. 102 (italics added).

statement is no more than an administrative hope, likely guided in a desire for efficiency in adjudication. It is not a deadline for consideration of waiver requests.

Nor could that date operate as a bar to waiver requests. Section 1.3 of the Commission's Rules allows it to issue a waiver of its rules "for good cause shown."<sup>11</sup> Like its counterpart rule regarding declaratory rulings, the waiver rule is not designed to address hypothetical situations. As of April 30, 2015, United was not aware that any such "controversy" existed as between it and Craftwood. This is because Craftwood did not file its lawsuit against United until the *day after* the Commission's expected filing "window." Plaintiffs' timing is suspect. It appears that Plaintiffs were waiting for the FCC's "window" to pass before they filed their class action lawsuit on May 1, 2015. Shortly thereafter, Petitioners, suddenly aware of a controversy regarding its fax transmissions, submitted their petition.<sup>12</sup> Had Plaintiffs made any effort to contact Petitioners in March, when they first received an allegedly non-compliant fax, United could have applied for a waiver within the FCC's expectation.<sup>13</sup> However, Plaintiffs made no attempt to contact the sender of the faxes nor did they attempt to opt-out of receiving faxes that allegedly violated the Commission's rule, despite the fact that the faxes clearly identified the sender and provided a toll-free number to call to opt-out of future transmissions. Rather, Plaintiffs, who have complained to the FCC more than 300 times regarding junk faxes, sat on the allegedly objectionable faxes in order to file a lawsuit seeking at least \$15 million on behalf of

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<sup>11</sup> 47 C.F.R. § 1.3.

<sup>12</sup> See *United Petition*, ¶ 30.

<sup>13</sup> Ms. Brunjes states her company, Bay Hardware, received its first facsimile transmission on March 3, 2015. Mr. Brunjes states his company, Craftwood, received its first facsimile transmission on March 27, 2015. See Declaration of David Brunjes, ¶ 7; See Declaration of Diana Brunjes, ¶ 5.

themselves and the putative class.<sup>14</sup> At that point, a controversy existed for which declaratory ruling or a waiver is appropriate. United filed promptly thereafter.

Moreover, regardless of when petitions are filed, the FCC has an obligation to address them under the applicable substantive criteria. United meets the Commission's "high hurdle" for filing a petition for waiver as it has pled "with particularity the facts and circumstances which warrant such action."<sup>15</sup> Notably, "timeliness" is not an enumerated factor for consideration of a waiver.<sup>16</sup> As such, the Commission has an obligation to consider United's petition and the FCC should ignore Plaintiff's speculative argument that the filing of retroactive waivers is subject to strict and inflexible filing deadlines.<sup>17</sup> Moreover, the Commission must treat similarly-situated parties similarly, because failing to do so would be arbitrary and capricious.<sup>18</sup> Because United is similarly situated to those parties that previously filed with the Commission, the Administrative Procedure Act compels the FCC to grant United's petition for retroactive waiver.<sup>19</sup>

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<sup>14</sup> *Craftwood II, Inc. v. United Stationers, Inc.*, No. SA CV 8:15-cv-00704-JLS-DFM (C.D. Cal. July 31, 2015).

<sup>15</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

<sup>16</sup> *See id.*

<sup>17</sup> *Id.* ("an agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances."). *See Omnipoint Corp. v. FCC*, 78 F.3d 620, 631 (D.C. Cir. 1996) (The Commission waived the comment requirement because the waiver was "necessary in order to reduce the harm resulting from delay").

<sup>18</sup> *See Green Country Mobilephone, Inc. v. FCC*, 765 F.2d 235, 238 (D.C. Cir. 1985) (holding that the Commission's decision to "waive[] a deadline in one case but not in another" was arbitrary and capricious); *See Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975).

<sup>19</sup> *See* 47 U.S.C. § 227(c)(4).

## II. THE COMMISSION HAS THE AUTHORITY TO WAIVE ITS REGULATIONS

Plaintiffs' claim that the FCC cannot waive the regulation in question has been addressed already in the *Solicited Fax Order*. The Commission may waive any of its rules for good cause shown and the courts have repeatedly upheld this authority.<sup>20</sup> Moreover, the Commission may grant a waiver where in "special circumstances" a waiver would not frustrate the purpose of the rule and would "better serve the public interest than would application of the rule."<sup>21</sup>

The stated purpose of 47 C.F.R. § 64.1200(a)(4)(iv) is to ensure that fax recipients have the necessary contact information to opt-out of receiving faxes, should they choose to do so.<sup>22</sup> The FCC acknowledged that an "inconsistent footnote" in the *Junk Fax Order* "caused confusion or misplaced confidence regarding the applicability of the [opt-out notice] requirement."<sup>23</sup>

Contrary to Craftwood's assertion, the FCC's decision to grant a retroactive waiver does not impermissibly encroach upon the power of the judiciary. In the *Solicited Fax Order*, the FCC flatly denies this claim when it "reject[ed] any implication that by addressing the petitions filed in this matter while related litigation is pending, we have 'violate[d] the separation of powers vis-à-vis the judiciary'"<sup>24</sup> In this instance, the FCC is acting pursuant to its Congressional mandate to "prescribe regulations to implement the requirements of this

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<sup>20</sup> See 47 C.F.R. § 1.3; See, e.g., *Nat'l Ass'n of Broadcasters v. FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009).

<sup>21</sup> *Solicited Fax Order*, ¶ 23; cf 47 C.F.R. § 1.925(b)(3)(i)-(ii) ("The Commission may grant a request for waiver if it is shown that: The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or [i]n view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest. . .").

<sup>22</sup> *Solicited Fax Order*, ¶ 20; see Junk Fax Prevention Act of 2005, ¶ 48, Pub. L. No. 109-21, 119 Stat. 359 (2005) (codified at 47 U.S.C. §227).

<sup>23</sup> *Solicited Fax Order*, ¶¶ 26-28.

<sup>24</sup> *Solicited Fax Order*, ¶ 21.

subsection.”<sup>25</sup> In addition to the FCC’s authority to prescribe regulations, the FCC also found that the TCPA’s authorization of private actions “does not undercut our authority, as the expert agency, to define the scope of when and how our rules apply.”<sup>26</sup>

The FCC can waive a rule when “particular facts would make strict compliance inconsistent with the public interest.”<sup>27</sup> When the FCC chooses to do so, it is not intervening in a private right of action, but rather it is exercising the quintessential authority that has been bestowed upon the agency to decide whether its own rules apply.<sup>28</sup>

Moreover, Craftwood’s reliance on *Physicians Healthsource, Inc. v. Stryker Sales Corp.* (“Stryker”) and *Natural Resources Defense Council v. EPA* (“NRDC”) is also misguided.<sup>29</sup> In *Stryker*, the court assumed that the TCPA’s opt-out notice was a *statutory* requirement rather than a requirement created by the Commission’s rules. The *Solicited Fax Order* held that the

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<sup>25</sup> See *id.* (citing 47 U.S.C. § 227(b)(2)) (“By addressing requests for declaratory ruling and/or waiver, the Commission is interpreting a statute, the TCPA, over which Congress provided us authority as the expert agency.”)

<sup>26</sup> See *id.* (citing 47 U.S.C. § 227(b)(2)).

<sup>27</sup> *AT&T Wireless Services, Inc. v. FCC*, 270 F.3d 959, 965 (D.C. Cir. 2001) (quoting 47 C.F.R. § 1.3) (quoting *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)).

<sup>28</sup> *Solicited Fax Order*, ¶ 21. For similar reasons, the FCC should ignore Plaintiffs’ one-sided factual assertions regarding the merits of the case, many of which relate to claims in the litigation other than the opt-out notice on faxes. United will, at the appropriate time, address Plaintiffs’ factual allegations in the litigation. The FCC need not address such factual allegations here.

<sup>29</sup> *In the Matter of Junk Fax Prevention Act of 2005, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket Nos. 05-338, 02-278, Comments by Craftwood II, Inc., and Craftwood Lumber Company on Petition for Retroactive Waiver of the Commission’s Rule on Opt-Out Notices on Fax Advertisements Filed by United Stationers Inc., United Stationers Supply Co. and Lagasse LLC, 14-19 (June 12, 2015) (“*Craftwood Comments*”); See *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, No. 1:12-cv-0729, 2014 WL 7109630, at \*14 (W.D. Mich. Dec. 12, 2014); See *Natural Resources Defense Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014).



requirement is a rule, adopted to implement the statute's goals. Further, to the extent that the court (a district court) held the Commission lacked the authority to grant a waiver of its own rules, the court exceeded its jurisdiction. Higher courts have found that "district courts lack jurisdiction to consider claims to the extent they depend on establishing that all or part of an FCC order subject to the Hobbs Act is 'wrong as a matter of law' or is 'otherwise invalid.'"<sup>30</sup>

In *NRDC*, the court was interpreting specific provisions of the Clean Air Act to determine whether that agency had the authority to administer a private right of action under the Act. The EPA is a different agency with a disparate statutory scheme. Unlike the current action, the EPA could not rely on any authority that was as broad or well-established as the Commission's waiver authority.<sup>31</sup> Therefore, neither the *Stryker* nor *NRDC* case is persuasive when determining the Commission's waiver authority and accordingly, these cases have no bearing on the Commission's authority to administer any rules it prescribes pursuant to the TCPA.

### **III. UNITED IS "SIMILARLY SITUATED" TO THE ORIGINAL PETITIONERS COVERED BY THE OPT-OUT ORDER**

Craftwood's comments assert that Petitioners were "unaware" of the opt-out notice requirements and that this ignorance of the law should preclude Petitioners from obtaining a waiver.<sup>32</sup> Craftwood mischaracterizes Petitioner's statements. Petitioners were aware of the opt-out requirements under Section 64.1200(a)(4)(iv), but like so many other similarly situated parties, Petitioners were *not* aware that those opt-out notice requirements applied to facsimiles that Petitioners sent to recipients who had provided their prior express invitation or permission.

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<sup>30</sup> *Mais v. Gulf Coast Collection Bureau, Inc.* 768 F.3d 1110, 1120 (11th Cir. 2014).

<sup>31</sup> See Letter of Helgi C. Walker, Counsel for Staples, Inc., and Quill Corp., to Marlene H. Dortch, FCC Secretary, CG Docket Nos. 02-278 & 05-338, at 2 (May 21, 2014) (citing *National Ass'n of Broadcasters v. FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009), and *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)).

<sup>32</sup> *Craftwood Comments*, 20-21.



As its Petition states, United is similarly situated to the petitioners in the Order, for the same reasons cited in the Order, notably, that the FCC's guidance led to "confusion among affected parties (or misplaced confidence that the opt-out notice rule did not apply to fax ads sent with the prior express permission of the recipient)."<sup>33</sup> Further, in the Order, the FCC determined that its guidance, in and of itself, was presumptively confusing and the Commission did not base the granting of waivers on the subjective mindset of each petitioner. Given this determination, it is a waste of the Commission's time and resources to conduct "mini-trials" to ascertain each of over 100 petitioners' state of mind.<sup>34</sup>

#### IV. GRANTING UNITED A WAIVER IS IN THE PUBLIC INTEREST

Craftwood's comments do nothing to rebut the good cause which exists for granting United's Petition. First, as United previously showed, special circumstances warrant deviation from the Commission's rules in this case due to the wide-spread confusion amongst affected parties regarding whether the opt-out requirements applied to solicited faxes.<sup>35</sup> Specifically, due to the confusion caused by the *Junk Fax Order*, particularly the lack of explicit requirement in the Commission's Notice of Proposed Rulemaking and the contradictory language in the Commission's order implementing the Junk Fax Prevention Act, it was not clear to United that such information was required for solicited faxes as well as for unsolicited faxes.<sup>36</sup> This presumptively establishes good cause for retroactive waiver of the Commission's regulation.<sup>37</sup> Second, granting a waiver here is consistent with the stated purpose of the TCPA and its

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<sup>33</sup> *Solicited Fax Order*, ¶ 24.

<sup>34</sup> *See id.* ¶¶ 24.

<sup>35</sup> *Solicited Fax Order*, ¶¶ 24-25.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* ¶ 24.

implementing regulations, such an application would better serve the public interest than would a strict application.

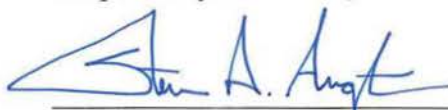
Finally, denying Petitioners a waiver will expose them to potentially unjust and inequitable monetary damages. In so doing, the Commission will not be acting in the public interest as its decision will do nothing to further the TCPA's stated policy objectives. As the Commission explained, the public interest is better served by not subjecting businesses to potentially crippling damages when they understandably were confused by the regulation and inadvertently (and allegedly) did not comply with it.

Similar to those parties granted an express waiver by the *Solicited Fax Order*, Petitioners sent facsimiles to recipients who had provided their prior express invitation or permission and were not aware that opt-out notices were required on such faxes. Granting a waiver in this case is warranted because of the special circumstances acknowledged by the Commission, and because such waiver would not undermine the policy objective of stopping unwanted faxes and would better serve the public interest. Petitioners are therefore similarly situated to the parties granted waivers pursuant to the *Solicited Fax Order* and are equally entitled to a retroactive waiver.

### CONCLUSION

For all of these reasons, petitioners United Stationers Inc., United Stationers Supply Co., and Lagasse LLC are similarly situated to the original petitioners that were previously granted retroactive waivers. United Stationers Inc., United Stationers Supply Co., and Lagasse LLC respectfully request that the Commission grant them the same retroactive waiver of Section 64.1200(a)(4)(iv) for all solicited fax advertisements sent by or on behalf of the Petitioners prior and up to six months from the release date of the Order.

Respectfully submitted,



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Dated: June 19, 2015

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